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Physician-Patient Privilege

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PHYSICIAN-PATIENT PRIVILEGE

In a child custody case, the mother sought to take the deposition of the father's neuropsychiatrist, but the father objected that the medical information was privileged. *Held*, a physician-patient privilege did not bar the physician from testifying in a civil action. *Moosa v. Abdalla*, 248 La. 344, 178 So. 2d 273 (1965).

In light of present constitutional and statutory provisions, as well as prior jurisprudence, this decision is correct.[1] However, it is one more step toward anomaly in the area of physician-patient privilege in Louisiana law. Louisiana is the only state with a physician-patient privilege in criminal cases[2] but not in civil cases. Yet a psychologist-patient privilege exists in both civil and criminal cases.[3] This paper will consider possible solutions to this problem. Such considerations are timely, as the Louisiana State Law Institute is now preparing a Code of Evidence.

The principle of privileged communications is based on an exception to the general rule that any witness must testify to all relevant facts he knows. It is felt, in certain instances, that the general public benefits more by the exclusion of relevant

1. La. Const. art. 178 (1879); La. Const. art. 297 (1898); La. Const. art. 297 (1913); LA. CONST. art. VI, § 12 (1921) provides: "The Legislature shall provide . . . for protecting confidential communications made to practitioners of medicine and dentistry and druggist by their patients and clients while under professional treatment and for the purpose of such treatment." State v. Genna, 163 La. 701, 112 So. 655 (1927) (The constitutional provision is not self-operative in connection with public and private doctors. It calls for legislative implementation if privilege desired); Boulware v. Boulware, 153 So. 2d 182 (La. App. 2d Cir. 1963). See generally Comment, 20 LA. L. REV. 418 (1960); *The Work of the Louisiana Appellate Courts for the 1964-1965 Term — Evidence*, 26 LA. L. REV. 606, 614 (1966).

2. LA. R.S. 15:476 (1950): "No physician is permitted, whether during or after the termination of his employment as such, unless with his patient's express consent, to disclose any communication made to him as such physician by or on behalf of his patient, or the result of any investigation made into the patient's physical or mental condition, or any opinion based upon such investigation, or any information that he may have gotten by reason of his being such physician; provided that the provisions of this article shall not apply to any physician, who, under the appointment of the court, and not by a selection of the patient, has made investigation into the patient's physical or mental condition; provided, further, that any physician may be cross-examined upon the correctness of any certificate issued by him."

3. *Id.* 37:2366: "A certified psychologist shall not be examined without the consent of his client, as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall a certified psychologist's secretary, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity." The origin of this provision is interesting. See La. Acts 1964, No. 347, § 16.

testimony than by its admission. England has never held that communications between a patient and his doctor merit such protection. New York was the first common law jurisdiction to adopt a physician-patient privilege;[4] since then, a majority of states have adopted such a privilege in some form.[5] Its justification is a desire to encourage the patient to disclose to his physician all information relevant to his treatment. But since its inception, writers have offered reasons why this justification is outweighed by other factors. The best reason comes from Professor Wigmore, who tests the propriety of any privileged communication with four canons: "(1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.* (4) The *injury* that would inure to the relation by disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."[6] All must be answered affirmatively for the privilege to be sustained, but Wigmore feels that for the physician-patient privilege, only the third can be answered in the affirmative.[7] Also, there is a lack of evidence that patients in England and the New England states, where no physician-patient privilege exists, "stay away from the doctor's office on that account."[8] Another reason offered is that since few people are aware of it, and thus do not rely on it, it serves no purpose. Finally, it is believed that one's ordinary ailments are a favorite topic of conversation, and that even though such may not be true for serious ailments, no one would fail to seek medical attention from fear that others may learn of them.

4. 2 N.Y. REV. STAT. part III, ch. 7, tit. 3, art. 8, § 73 (1829), reprinted in MCCORMICK, EVIDENCE § 101 (1954): "No person authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."

5. See 8 WIGMORE, EVIDENCE § 2380, n.5 (McNaughton rev. 1961) for a listing of physician-patient privilege statutes as of 1961. See also CALIF. EVIDENCE CODE §§ 990-1007 (1965) and ILL. REV. STAT. ch. 51, § 5.1 (1959).

6. 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

7. *Id.* § 2380a.

8. Chafee, *Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand,* 52 YALE L.J. 607, 609 (1943). For other discussions see Purrington, *An Abused Privilege,* 6 COLUM. L. REV. 388 (1906); Curd, *Privileged Communications Between Doctor and His Patient — An Anomaly of the Law,* 44 W. VA. L.Q. 165 (1938); Welch, *Another Anomaly — The Patient's Privilege,* 13 MISS. L.J. 137 (1941).

Three possible approaches to the privilege are: (1) Adopt a privilege containing currently recognized exceptions necessary for preventing abuses. (2) Adopt a "quasi privilege" which would prohibit disclosures by physicians unless the trial judge, in his discretion, determines disclosure is necessary to the proper administration of justice. (3) Repeal the statutory privilege in criminal cases, thus leaving Louisiana with no physician-patient privilege.

1. Adopt a Privilege With All Its Exceptions

The New York statute in 1828 simply provided that all disclosures to the physician "necessary to enable him to prescribe for such patient as a physician"[9] were protected. No exceptions were recognized. However, as the various states adopted privilege statutes, it became obvious even to those in the medical profession that certain abuses of the privilege were occurring. Some of these abuses were combatted by making various exceptions to the privilege. A few of the more important exceptions will be discussed.

(a) The privilege should not apply in criminal cases.

A majority of states make no distinction between criminal and civil cases in applying the privilege. The few that do, allow the privilege in civil but not in criminal cases.[10] Louisiana is the only state with a privilege in criminal cases but none in civil cases.

In certain criminal prosecutions, as homicide, abortion, and malpractice, the public interest in prosecuting offenders outweighs any justification allowing the privilege to prevent a doctor's relevant testimony. From this position it is but a short step to the Uniform Rules of Evidence, which do not allow the privilege in any felony case.[11] It is submitted that one should not stop here. The public interest in protection from all crimes, including misdemeanors, is great enough for the privilege not to exist in any criminal prosecution.

(b) The privilege should not apply in suits to determine the competency of a deceased patient when his

9. See note 4 *supra.*

10. ALASKA COMP. LAWS ANN. § 58-6-6 (1949); HAWAII REV. LAWS § 222-20 (1955); MONT. REV. CODE tit. 93, ch. 704, § 4 (replacement vol. 1964); PA. STAT. ANN. tit. 28, § 328 (1958); S.D. CODE tit. 36, § 36.0101(3) (Supp. 1960).

11. UNIFORM RULE OF EVIDENCE 27(2).

competency is relevant to validity of an instrument by which he disposed of property.

It is important to recognize in discussing this exception and the next that the privilege is personal to the patient. The physician is always a competent witness and must testify unless the privilege is asserted by the patient or, after his death,[12] his personal representative.

This exception has its greatest value in guaranteeing the expert medical testimony which is often lacking in cases contesting validity of a will. The deceased patient would want the information disclosed if it allows the court to discover his true intentions.

(c) The privilege should not be used by a beneficiary of life insurance to exclude communications between the insured and his physician.

Again the court must first determine whether the asserter (the beneficiary in this case) is a proper representative of the deceased patient. The most frequent application of this exception is when a life insurance company seeks to prove the insured made misrepresentations of his physical condition. When the insurance company attempts to use the testimony of the insured's physician, the beneficiary asserts the physician-patient privilege. This objection is usually nothing more than a tactical maneuver to conceal the fraudulent acts of the insured. Thus the same argument used against the privilege in criminal cases can be used to prevent its use to foster fraudulent acts. This exception would go further and prevent use of the privilege to exclude relevant communications between the insured and his physician when there are no allegations of misrepresentation. Even here the instances where the beneficiary asserts the privilege out of loyalty to the deceased would be too few to justify the suppression of valuable medical testimony.

(d) The privilege should not apply in commitment proceedings.

There should be no privilege because the proceedings are primarily for the benefit of the holder of the privilege and the

12. For a discussion of who should be able to assert the privilege of the deceased patient, see 8 WIGMORE, EVIDENCE 2391 (McNaughton rev. 1961).

public has a great interest in the prompt and proper care of the mentally incompetent.

(e) The privilege should not apply when the patient seeks recovery for personal injuries.

Here, as in the life insurance cases, the privilege may be used to foster fraudulent acts. An injured plaintiff who is exaggerating his injuries can assert the privilege to exclude testimony of the physician who treated him — often the only means of proving the extent of his injuries. It is submitted that the plaintiff "waives" his physician-patient privilege when he describes his injuries in his petition and demands damages. Although some old cases require something more from the patient,[13] such as calling the physician to the stand[14] or testifying himself to the extent of the injuries,[15] to constitute a waiver, the recent trend in statutory privilege is to create an exception in personal injury cases.[16] In fact some states have gone even further by excepting "in all civil suits brought by *or against* the patient , . . . wherein the patient's physical or mental condition is an issue."[17]

Other instances where there should be an exception are when a patient seeks the services of a physician to enable him to commit a tort,[18] when the abuse of children is involved,[19] and when a physician is suing a patient for the recovery of professional fees. Further, in workmen's compensation cases, it is gen-

13. Federal Mining & Smelting Co. v. Dalo, 252 Fed. 356 (9th Cir. 1918); Smart v. Kansas City, 208 Mo. 162, 105 S.W. 709 (1907); Kassow v. Robertson, 143 N.E.2d 926 (Ohio App. 1957); American Bankers' Ins. Co. v. Hopkins, 67 Okla. 150, 169 Pac. 489 (1917).

14. Weis v. Weis, 147 Ohio St. 416, 76 Ohio App. 483, 65 N.E.2d 300, 72 N.E.2d 245 (1947); McUne v. Fuqua, 42 Wash. 2d 65, 253 P.2d 632, *on rehearing*, 257 P.2d 636 (1953).

15. Hethier v. Johns, 233 N.Y. 370, 135 N.E. 603 (1922); *In re* Lowenthal, 101 Ohio App. 355, 134 N.E.2d 158 (1956).

16. Compare ILL. REV. STAT. ch. 51, § 5.1 (1959), exception 5 (the relatively recent Illinois physician-patient privilege statute contains 7 exceptions); CALIF. EVIDENCE CODE § 996 (1965) (the California phsyician-patient statute, which is the most recent one, contains 12 exceptions); UNIFORM RULE OF EVIDENCE 27(4).

17. ILL. REV. STAT. ch. 51, § 5.1 (1959).

18. CALIF. EVIDENCE CODE § 997 (1965); UNIFORM RULE OF EVIDENCE 27(6).

19. See Symposium — *The Battered Child Syndrome*, 181 A.M.A.J. 17 (1962) for an extensive analysis of the problem of child abuse. As a result of the national interest the problem recently gained, numerous state legislatures reacted by abolishing the physician-patient privilege in child abuse cases. Louisiana's statute is typical. See LA. R.S. 14:403 (1954).

erally recognized that the technical rules of evidence such as the physician-patient privilege should not be applied.[20]

2. Adopt a "Quasi Privilege"

A second alternative would be to adopt a "quasi privilege." The one presently in force in North Carolina provides:

> "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to the proper administration of justice.*"[21]

Professor McCormick says "a clear-eyed and courageous judiciary, trial and appellate, with an appreciation of the need for truth and fear of its suppression, could draw the danger of injustice from the privilege, under this provision."[22] However, the North Carolina statute did not live up to expectations. Indications are that judges have failed to use their wide margin of judicial discretion to correct some of the classic abuses of the privilege.[23] As a result an attorney is too uncertain to fully advise his client on the availability of the privilege in a particular situation.

3. Abolish the Privilege

A third alternative is to simply abolish the privilege. In favor of this approach, the traditional arguments previously mentioned can be advanced. The following are particularly important for Louisiana to consider. This state does not have to look as far as England or New England to find states managing

20. Professor Wigmore lists 27 "privilege states" which repudiate the privilege in workmen's compensation cases. See 8 WIGMORE, EVIDENCE 2380, n.6 (McNaughton rev. 1961). See also Morgan v. American Bitumul Co., 39 So. 2d 139 (La. App. 1st Cir. 1949).

21. N.C. GEN. STAT. § 8-53 (1953). Virginia has a similar provision. VA. CODE ANN. § 8-289.1 (1950).

22. MCCORMICK, EVIDENCE § 108 (1954).

23. Sims v. Charlotte Liberty Mut. Ins. Co., 256 N.C. 32, 125 S.E.2d 326 (1962) (suit by life insurance beneficiary); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964) (personal injury suit); Creech v. Sovereign Camp of the Woodmen of the World, 211 N.C. 658, 191 S.E. 840 (1937) (suit by life insurance beneficiary); Metropolitan Life Ins. Co. v. Boddie, 194 N.C. 199, 139 S.E. 228 (1927) (suit by life insurance beneficiary).

successfully without a physician-patient privilege. Closer to it are Alabama, Florida, Georgia, and Texas.[24] Today, even the medical profession seems to recognize that if privilege is to be established, numerous exceptions must be made. How can an ordinary layman rely on a privilege with these exceptions and details when he goes to his physician for treatment? Finally, even assuming that the ordinary layman was familiar with the privilege and disclosed all to his physician in reliance upon it, how could he be sure that subsequent events would not permit one of the exceptions to apply?

For these reasons, it is submitted that the policy factors in favor of a physician-patient privilege are outweighed by those against it. Thus Louisiana should add its name to the list of "no privilege" states.

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24. Compare McCormick & Ray, Texas Law of Evidence § 491 (2d ed. 1956), which seems to indicate the author's satisfaction with Texas' no-privilege status, to Welch, *Another Anomaly — The Patient's Privilege*, 13 Miss. L.J. 137 (1941), where the author expresses a view that Mississippi's physician-patient privilege has been unsuccessful and suggests its abolition.